



**Omar v Attorney General & 3 others (Petition E001 of 2023)  
[2024] KEHC 6181 (KLR) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6181 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PETITION E001 OF 2023**

**JRA WANANDA, J**

**MAY 31, 2024**

**IN THE MATTER OF CONTRAVENTION OF BREACH AND/OR  
INFRINGEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF ARTICLES 3, 22, 27, 29, 47, 50 AND 165 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL OF ASSETS ACT, 2015**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL RULES 4 AND 10) PRACTICE RULES, 2013**

**BETWEEN**

**GOLICHA GENGE OMAR ..... PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY MINISTRY OF STATE FOR  
DEFENCE ..... 2<sup>ND</sup> RESPONDENT**

**THE CHAIRMAN TENDER COMMITTEE MINISTRY OF STATE FOR  
DEFENCE ..... 3<sup>RD</sup> RESPONDENT**

**M/S ELDORET STANDARD BUTCHERY ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The Petition herein is dated 26/07/2021 and was initially filed in Nairobi as Milimani Constitutional Petition No. E322 of 2021 before being transferred to this Court vide the orders made by Mrima J on 31/01/2023. Upon being transferred to this Court, the Petition was assigned the present case number.
2. The Petition is supported by the Affidavit sworn by the Petitioner and seeks orders as follows:
  - a. A declaration that the 2<sup>nd</sup> Respondent discriminated against the Petitioner in contravening the award and granting the supply of fresh meat (beef) on bone to the 4<sup>th</sup> Respondent
  - b. A declaration and finding that the Respondents contravened Sections 98(a), (b), (c) and 100(1), (2) and (3) of the Public Procurement and Disposal of Assets Act, 2005 with raw impunity
  - c. A declaration that the Respondents' illegal actions led to the delay to supply hence the Petitioner's 273 cows died of foot and mouth disease and East Coast Fever which act visited upon the Petitioner with physical and psychological torture contrary to Article 29 of *the Constitution*.
  - d. The Respondents be ordered jointly and severally to pay the Petitioner damages for discrimination and breach of contract which visited on the Petitioner with physical and psychological torture without any colour of right.
  - e. Special damages amounting to Kshs 8,599,500/- for loss of 273 cows to East Coast Fever and foot and mouth disease.
  - f. Loss of income in terms of the 1000kg of meat supply to Moi Barracks Eldoret unit daily x210 Kshs. the price quoted by the Petitioner, and awarded price by the Public Procurement and Review Board x30 days one month x12 (one year) it translates to 1000kg x Kshs 210/= x 30 day x 12 months = Kshs 75,600,000/=
  - g. As an expression of displeasure by this Honourable Court against the Respondents (individual officers) be condemned to pay exemplary damages for flouting *the Constitution*, the procurement law and procedure thereto.
  - h. Costs of this Petition.
3. The factual background of the Application is stated to be that the Petitioner had been supplying the 2<sup>nd</sup> Respondent's Eldoret based units with fresh meat (beef) on bone, that during the period of the supply by the Petitioner no objection or question had ever been raised as to its quality or quantity thereof, that on 3/01/2012, the 2<sup>nd</sup> Respondent advertised a restricted tender No. MOSD/423/348/2011-2012 for the supply of the meat to its Eldoret units and the Petitioner bid for the tender and met all the requisite conditions, that the bids were opened and evaluated accordingly and the tender committee awarded the same to the 4<sup>th</sup> Respondent, that the Petitioner was not satisfied with the criteria used by the tender committee to award the tender to the 4<sup>th</sup> Respondent and preferred an Appeal to the Public Procurement Administrative Review Board (hereinafter referred to as "PPARB").
4. It was pleaded further that pursuant to Section 98(c) of the Public Procurement and Disposal of Assets Act, 2005 (hereinafter referred to as the "PPDA Act"), the PPARB annulled and substituted the decision of the Procuring Entity by ordering it to award the tender to the Petitioner at its quoted price,



that neither the 2<sup>nd</sup> nor the 4<sup>th</sup> Respondent challenged the findings of the PPARB by way of Judicial Review as envisaged under Section 100(1), that in non-compliance with the PPARB's order, Sections 100(1), (2) and (3) and 100(a), (b) and (c) of the PPDA Act, and civility, decency and prudence in business, the 2<sup>nd</sup> Respondent continued with the impunity to receive supply from the 2<sup>nd</sup> Respondent notwithstanding that the contract had been nullified by the PPARB on 11/05/2012.

5. It was pleaded further that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents were well aware that the tender had been annulled but however assumed the law and continued without a contract, that the Petitioner reported the continued disobedience of the orders to the police and also wrote to the Principal Secretary, Ministry of State for Defence to the Director-General of Public Procurement Oversight Authority, that on 9/07/2012 the Principal Secretary Ministry of State for Defence replied by cancelling the tender which act amounted to breach of contract and contrary to the PPD Act, that on 7/11/2012, the Petitioner moved to Court seeking orders of mandamus to compel the Respondent to comply bearing in mind that the Petitioner had already purchased the cattle for supply of the meat, that the Judicial Review orders were never granted and were of no help as the Court observed that the contract was for 1 year and dismissed the Petitioner's case, that the cows that the Petitioner had purchased stayed in his yard for several months waiting slaughter however a misfortune befell them as they were struck by foot and mouth disease which was compounded by East Coast Fever and which led them to death leaving the Petitioner dejected and frustrated.
6. Regarding the nature of constitutional and legal injury, it was stated that as a result of the unlawful acts of the Respondents visited upon the Petitioner, he has been rendered hopeless and faithless in the institution established to operate within the precincts of the law and make the carrying out and doing business smooth, that the Petitioner has been made a stranger in his own country by failure of the institutions established by *the Constitution* to serve him objectively, that the Petitioner has been rendered a pauper as he pooled all his resources in doing business with government departments which in its dealings is shrouded with lack of transparency and that by virtue of the Respondent's illegal actions, the Petitioner lost to the tune of Kshs 84,199,500/=.

### **1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' Response**

7. In opposing the Application, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents, through the Hon. Attorney General, filed the Notice of Preliminary Objection filed on 8/05/2023 and the Replying Affidavit filed on 2/10/2023 and sworn by Patrick Mariru, the Principal Secretary in the Ministry of Defence.
8. In the Preliminary Objection, it was stated that the Petition discloses a purely commercial dispute disguised as a Constitutional issue, that the Petition is an abuse of Court as civil remedies are available to the Petitioner in Eldoret HCCC No. 2 of 2016 as ordered in a Ruling delivered on 23/05/2023, that the Petitioner has not disclosed details of all civil matters involving the Petitioner and the Respondents herein, which are related to the matters in issue as required under Rule 10(2)(e) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and that the Petition does not expressly disclose infringement of any fundamental rights, if any, of the Petitioner.
9. In the Replying Affidavit, the Principal Secretary stated that it is true that prior to the year 2012, the Petitioner had been supplying fresh meat bones (beef) to the Kenya Defence Forces at Eldoret based units, that on 3/02/2021, the Ministry of Defence advertised the said restricted tender upon which the Petitioner and 5 other firms submitted bids, that upon evaluation by the 3<sup>rd</sup> Defendant, the tender was awarded to the 4<sup>th</sup> Respondent with whom the Ministry of Defence then entered into a formal contract on 17/04/2012 for a period of 1 year on a "as and when required" basis, that indeed the Petitioner was the second lowest bidder however the physical evaluation team recommended the 4<sup>th</sup> Respondent due to its proximity to the Eldoret based units, its track record, its capacity and its strict compliance with



public health standards and that a combination of the commercial and physical evaluation rated the 4<sup>th</sup> Respondent first followed by the Petitioner,

10. He deponed further that the Petitioner, being discontented by the criteria used, lodged a request for Review with the PPARB on 18/04/2021, that on 11/05/2011, the PPARB substituted the decision of the Ministry of Defence and ordered it to award the tender to the Petitioner at its quoted price, that however the Petitioner failed to extract and serve the order to the Ministry and the 4<sup>th</sup> Defendant as required by him, that the Petitioner filed a Judicial Review Application seeking to prohibit the Ministry from receiving meat on bone from any other party other than the Petitioner and an order of mandamus compelling the Ministry to re-award the tender to the Petitioner, that the Application was dismissed for two reasons; the Petitioner's failure to serve the Application upon the 4<sup>th</sup> Respondent and that the orders sought would no longer serve the intended purpose as the tender period had lapsed. He added that the Petitioner filed a Notice of Appeal but failed to file the substantive Appeal in time, that he sought extension of time and was given 25 days to file the Appeal upon which he filed Civil Appeal No. 68 of 2018 which he however withdrew on 26/02/2020, that the Petitioner, at the time the Appeal was alive, had filed Eldoret High Court Civil Case No. 2 of 2016 on 22/01/2016 seeking inter alia, loss of business and damages.
11. He deponed further that High Court Civil Case No. 2 of 2016 was against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents, the Public Procurement Oversight and Authority and the PPARB and the facts in issue and prayers sought therein are similar to the instant Petition, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein filed a Preliminary Objection on the grounds that the Court lacked jurisdiction, the suit was time-barred and was also Res Judicata and the Objection was sustained, that the Court stated that "the Plaintiff's suit against the 1<sup>st</sup> and 5<sup>th</sup> Defendants (1<sup>st</sup> and 2<sup>nd</sup> Respondent herein) is struck out ..... For the avoidance of doubt, the Plaintiff's suit against the 4<sup>th</sup> Defendant remains alive", that the 4<sup>th</sup> Defendant in High Court Civil Case No. 2 of 2016 is the 4<sup>th</sup> respondent herein.
12. The Principal Secretary deponed further that instead of pursuing his suit for damages against the 4<sup>th</sup> Respondent as was ordered by the Court, the Petitioner withdrew the suit, that the Petition herein discloses a purely ordinary commercial dispute disguised as a Constitutional issue which remedies were available in High Court Civil Case No. 2 of 2016, that after filing this instant Petition, the Respondents filed a Preliminary Objection based on 3 grounds, i.e. that the Court lacked jurisdiction, the Petition is time-barred pursuant to Section 3(2) of the Public Authorities Limitations Act and that it is Res Judicata, that the Objection was dismissed on 31/01/2023 on the sole basis that the Respondents had failed to attach the pleadings in High Court Civil Case No. 2 of 2016 and the Court thereafter rightfully transferred this Petition to Eldoret.
13. He added that this Court lacks jurisdiction, the Petition is Res Judicata with respect to the claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and that the same has been filed maliciously with the sole intention of skirting the provisions of Section 3(2) of the Public Authorities Limitations Act, that the Respondents request the Court to compare the pleadings in this Petition and those in High Court Civil Case No. 2 of 2016, that the Petitioner filed these suits in an attempt to mislead the Courts through forum shopping with the belief that he would not be exposed, that a Constitutional Petition must be particular and specific in the pleadings with reasonable precision, that the Petitioner has failed to adhere to this rule.
14. On the merits of the Petition, the deponent stated that the allegation that the Petitioner was discriminated against is unfounded and ambiguous, that the Petition does not disclose an infringement of the Petitioner's constitutional rights but an alleged failure by a State or Public Officer to comply with a decision of the Tribunal since the tendering period had lapsed on 31/05/2012 rendering the decision redundant/unenforceable. The deponent stated further that as regards the damages sought,



the same remain uncorroborated since there is no proof of the alleged outbreak of the Foot and Mouth disease or East Coast Fever or proof of purchase of the 273 cows, that in any event, purchase of the cows before a contract was entered into with the Ministry cannot be meted out or bind the Respondents, that Section 68(3) of the PPDA Act, 2005 (Repealed) proves that no privity of contract was formed between the parties, and that it also beats logic for the Petitioner to have bought the 273 cows yet the contract was on “as and when required” basis

### **Petitioner’s Further Affidavits**

15. The Petitioner filed 3 separate additional Affidavits which he however wrongly titled as “Replying Affidavits”. The same were filed on 12/06/2023, 3/10/2023 and 13/10/2023. There is however no evidence of leave sought or granted to file such additional Affidavits and the same are clearly liable to be expunged from the record. In the interests of justice however, I will not do so. However, upon perusal, I find that the further Affidavits consist of repetitions of what the Petitioner had already stated and/or deponed in his Petition and the Supporting Affidavit thereto. I will therefore not recount the same

### **Hearing of the Application**

16. It was then agreed, and I directed, that the Petition, including the Preliminary Objection, be canvassed by way of written submissions. Pursuant thereto, the Petitioner filed his Submissions on 24/06/2023 while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed theirs on 16/10/2023. The Petitioner, this time with leave, then filed Supplementary Submissions on 24/10/2023.

### **Petitioner’s Submissions**

17. On the issue of limitation under the Public Authorities Limitations Act and the *Limitation of Actions Act*, the Petitioner submitted that this is a constitutional Petition, and not a claim in tort or contract, that it is a claim relating to violation of constitutional rights which has no limitation as it is a claim in personam, that it is a claim alleging discrimination and thus a constitutional issue which had not been dealt with before. He added that his right to acquire and own property as detailed in Article 40 of *the Constitution* had been contravened, that the Respondents are relying on procedural technicalities which *the Constitution* under Article 159 does not allow. He cited the case of James Kanyiita Nderitu v The Attorney General & Another [2019] eKLR. On the issue of Res Judicata, he reiterated that the matters are different from the other cases cited by the Respondents. Regarding joinder of the 4<sup>th</sup> Respondent, he submitted that the 4<sup>th</sup> Respondent was the beneficiary of the unlawful tendering process and conspired with the other Respondents to breach *the Constitution*.

### **1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents’ Submissions**

18. On his part, Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents reiterated that this Court lacks jurisdiction to entertain this Petition as it is Res Judicata because the facts and prayers in this Petition are similar to those in Eldoret HCCC No. 2 of 2016, that the filing of this Petition is a sinister way of appealing the decisions of the Judicial Review Court and of the Commercial Division Court, that the remedies available to the Petitioner were to appeal those decisions or proceed with the suit against the 4<sup>th</sup> Respondent in Eldoret HCCC No. 2 of 2016 as was directed by the Court. Counsel also reiterated that the Petition is commercial in nature whose remedies are available to the Petitioner in Eldoret HCCC No. 2 of 2016 and that therefore the Court should invoke the principle of “constitutional avoidance”. He contended further that there was no enforceable contract between the parties since there was no written contract between them as required under Section 68 of the PPDA 2005 (Repealed). He also cited Sections 36(1) and (5) which, he argued, excludes the Respondents from liability. Further, Counsel submitted that the Petitioner has not proved the allegations of violations of fundamental



rights and freedoms guaranteed by the Constitution and that a party who seeks to rely on a fact bears the burden of proving such fact as stipulated under Section 107(1) and 109 of the Evidence Act. He cited several authorities in support of his arguments.

### **Petitioner's Supplementary Submissions**

19. In his Supplementary Submissions, the Petitioner submitted that in the Ruling delivered herein on 13/10/2023, of Mrima J already made a finding that that the claim herein is constitutional and not commercial.

### **Determination**

20. I have not come across any Responses filed by the 4<sup>th</sup> Respondent in this matter and I will therefore determine this Petition on the basis of the pleadings filed by the Petitioner, on one part, and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, on the other.
21. The broad issues for determination in this mater, are in my view, the following:
- a. Whether the Petition herein raises constitutional matters.
  - b. Whether the Petition is Res Judicata.
  - c. Whether the Petition should be allowed.
22. The Petitioner has raised matters that if proved, show blatant acts of impunity allegedly committed by government officers. The allegations raised point to a situation where public officers may have chosen to ignore an express decision of the Public Procurement Administrative Review Board (hereinafter referred to as "PPARB") and proceeded to act contrary to that decision. An action seeking a finding of and punishment for contempt of Court would have been appropriate. However, since no finding of disobedience has so far been made, I will say no more about that allegation.
23. The Respondents have taken the position that the Petition should not be entertained because it discloses a purely commercial dispute disguised as a Constitutional issue. They contend further that the Petition does not disclose an infringement of the Petitioner's constitutional rights but an alleged failure by a State or Public Officer to comply with a decision of the Tribunal.
24. A perusal of the Petition and the Affidavits filed by the Petitioner reveals that the Petitioner's complaint or cause of action is basically that he is seeking relief against the Respondents for disobeying the orders of the PPARB by which the PPARB nullified the 3rd Respondent's award of the tender the subject herein to the 4th Defendant, and ordered the 3rd Respondent to instead, award the tender to the Petitioner. The contention raised by the Respondents attracts consideration of the doctrine of "constitutional avoidance".
25. In regard to this principle of "constitutional avoidance", the Supreme Court, in the case of Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR stated as follows:
- [105]. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:

"The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion"



26. On the same issue, in the case of *KKB v SCM & 5 others (Constitutional Petition 014 of 2020)* [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo J (as he then was), went further and remarked as follows:

“ 32. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority*<sup>20</sup> the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.<sup>21</sup> Currie and de Waal<sup>22</sup> opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights.

.....

33. .... It is the fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy.<sup>23</sup> One needs to be aware however of the singleness of the legal system. This is embodied in the fact that the supremacy of/ *the Constitution* does not detract from the usefulness of the rest of the body of law. In essence all other laws give full expression to the ideals of *the Constitution* until found to be inconsistent to it.

.....

34. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system.

.....



36. In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause. The exceptions to the application of the doctrine of constitutional avoidance are: -

- i. where the constitutional violation is so clear and of direct relevance to the matter,
- ii. in the absence of an apparent alternative form of ordinary relief and
- iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.<sup>25</sup>

37. A reading of the issues presented in this Petition leave no doubt that the Petitioner's grievance if any can effectively be addressed in a matrimonial suit. The court handling the matrimonial case will be better suited to determine whether or not there was a valid marriage. The court will weigh the veracity or otherwise of the diametrically opposed positions presented by the parties. To me, this is a proper and fit case for this court to invoke the doctrine of constitutional avoidance and decline to entertain the matter as I hereby do.

38. Closely tied to the doctrine of constitutional avoidance and ripeness is the question whether this Petition raises a constitutional question. I have severally in my decisions including some cited in this case stated that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.<sup>26</sup> When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.<sup>27</sup>  
.....:-  
.....

39. .... Courts abhor the practice of constitutionalizing every dispute. Flowing from the issues discussed above, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's objection succeeds and on this ground the Petitioner's Petition is dismissed with no orders as to costs. Having so found, I find no reason to address the application for conservatory orders."

27. Similarly, in the case of *Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited* (2013) eKLR, Lenaola J (as he then was) stated as follows:

"Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of decision of *Haco Industries* where the converse may have been expressed as the position. My mind is clear however that not every ill in the society should attract a constitutional



sanction as stated in AG v Dutambala Criminal Appeal No 37 of 1991 (Tanzania Court of Appeal) such sanctions should be reserved for appropriate and really serious occasions...”

28. Further in John Harun Mwau v Peter Gastrow & 3 others (2014) eKLR, it was stated that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if the remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether in addition to breach of the other declaration of rights ... It is established practice where a matter can be disposed without recourse to *the Constitution*, constitution should not be invoked at all ...”

29. There is also the decision of L. Mugambi J in the case of *Anyango v Attorney General & 2 others (Petition 034 of 2021)* [2024] KEHC 254 (KLR) (Constitutional and Human Rights) (25 January 2024) (Judgment), in which he held as follows:

“44. In the instant petition, this court considers the allegations raised heavily lie in the tort of false imprisonment and malicious prosecution. The petitioner’s cause of action could have adequately been remedied by conventional torts law not as a constitutional grievance. I find the words of the Court of Appeal in James Kanyiita Nderitu v Attorney General and the Director of Public Prosecution (2019) eKLR relevant in this matter. The court in dismissing a similar matter stated:“...

“As we have stated above, the remedy for the appellant was to institute a suit for malicious prosecution. He has failed to do so and a constitutional petition cannot be used to circumvent primary legislation for enforcement of a given right or violation. It is not open to the appellant to urge that there can be no wrong without a remedy. Indeed, this legal principle is correct; the appellant had a remedy in the tort of malicious prosecution or an action for defamation, he has chosen not to pursue the causes of action within the legal time frame...”

30. Applying the above principles to the facts of this case, my view of the Petitioner’s case herein is that the issues raised in the Petition do not raise a constitutional issue. It is trite that in determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful, but the question is whether the argument forces the Court to consider constitutional rights or values. Constitutional Courts must be cautious to ensure that their mandate is not abused or trivialized and that the mere allegation that a human right or fundamental freedom has been or is likely to be contravened is not by itself sufficient to entitle an applicant to invoke the jurisdiction of a Constitutional Court especially if it is made for the purpose of avoiding applying the normal judicial remedy. Upon considering the matters raised herein, I am convinced that the Petitioner’s claim should have been pursued as an ordinary suit before the Commercial Division or Civil Division of the High Court. The claim is a pure commercial dispute upon which compensation for a commercial loss is what has been sought.

31. It is however evident that the Petitioner was himself at all times fully aware that the claim was an ordinary commercial claim since he had earlier filed Eldoret High Court Civil Case No. 2 of 2016 against several Defendants, including the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents herein. The grounds of the suit and the prayers sought, including damages, was similar to those in this instant suit. The names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent herein were however removed by the Court and only the 4<sup>th</sup> Respondent herein



left as a Defendant in the case. The reason for removal of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in that case was, as stated in the Ruling delivered by Kimondo J on 23/05/2017, that the suit as against the two Respondents was statute barred by dint of provisions of the Public Authorities Limitations Act. It is only after that decision that the Petitioner then brought the same grievances afresh but in terms of this Constitutional Petition, and withdrew the said earlier suit. It is clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein having been removed from that suit, the Petitioner formed the opinion that succeeding against the 4<sup>th</sup> Respondent which had been left as the only Defendant in that suit would prove an uphill task for the Petitioner.

32. It is therefore clear to me that this Petition was filed merely as an afterthought and as a means to circumvent the time limitations stipulated under the Public Authorities Limitations Act as already held by Kimondo J in Eldoret High Court Civil Case No. 2 of 2016.
33. It is also not lost on me that even prior to Eldoret High Court Civil Case No. 2 of 2016, the Petitioner had also filed Nairobi Judicial Review No. 384 of 2012 in which he sued the same 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein and sought orders of Mandamus to compel the Respondents to comply with the order of the PPARB directing them to award the said tender to the Petitioner.
34. It is an accepted principle of constitutional law that the Courts will not consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to a claimant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights. Courts have consistently rejected cases that are disguisedly instituted as constitutional disputes when in reality they are not. I find this to be one such case disguisedly instituted as a constitutional dispute. For this reason, I decline to entertain this Petition.
35. As aforesaid, the claims raised against the Respondents are serious as they relate to the possibility of a blatant act of arrogance of outrightly ignoring the orders of the Public Procurement Administrative Review Board by public officers who should know better. Had he been well advised and had he moved expeditiously through the correct route, the Petitioner stood a good chance of succeeding. It is unfortunate that in his zeal to pursue his rights, perhaps as a result of misadvice, the Petitioner pursued his claims in the wrong forum and also found himself caught up by limitation of time. Regretably, the avenue of constitutional Petition is not available for curing of blunders committed elsewhere. Inasmuch as I sympathize with the Petitioner, the law has to be adhered to.
36. In view of findings above, I see no reason to make determinations on the other issues raised.

#### Final Orders

37. In the premises, the Petition dated 26/07/2021 is hereby dismissed but with no order on costs as the Petitioner, save for invoking the wrong forum, had genuine grievances to raise.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 31<sup>ST</sup> DAY OF MAY 2024**

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the Presence of:

Golicha Genge Omar – Petitioner – in person

Chemase for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Ms. Mutai h/b for Nyaribo for 4<sup>th</sup> Respondent

